Filed 6/19/19 P. v. Munoz CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DANIEL GARCIA MUNOZ,<br><br>Defendant and Appellant. | B290906<br><br>(Los Angeles County<br>Super. Ct. No. BA456968) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert Perry, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

A jury convicted appellant Daniel Garcia Munoz of sexual penetration by a foreign object and assault with intent to commit sexual penetration by a foreign object, finding appellant had sexually assaulted 68-year old M. H. in her apartment by digitally penetrating her vagina. At trial, the victim described the assault and identified appellant as the perpetrator. The victim's neighbors testified to what they heard during the assault, and to their observations of appellant fleeing the apartment immediately after the assault. The victim's vaginal injuries were consistent with a forceful digital penetration.

Appellant argues the trial court committed error when it denied his motion for a continuance to conduct independent testing of DNA evidence which was discovered and tested by the prosecution on the eve of trial. He also argues the trial court erred in failing to instruct on simple battery as a lesser included offense of sexual penetration by a foreign object. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

An information charged appellant with assault to commit a felony during the commission of a first degree burglary (Pen. Code, § 220, subd. (b), count one),[1] first degree burglary (§ 459, count two), and sexual penetration by a foreign object (§ 289, subd. (a)(1), count three).

### A. *Prosecution Case*

The victim was 68 years old at the time of the alleged incident and lived alone on Berendo Street. She had a preexisting medical condition in her leg that caused her to limp. She did not speak English and testified through the aid of a Vietnamese interpreter.

On the night of May 1, 2017, the victim was in the bathtub. The bathroom door was partially open, and the victim was naked. She heard a noise, as if someone outside was fixing a broken pipe. As the victim stepped out of the bathtub, she saw appellant standing by the entrance to the bathroom. She screamed, and appellant shushed her. She tried to push past

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[1] All further unspecified citations are to the Penal Code.

him to get out of the bathroom, but appellant pushed her against the door and pulled her by the arm into the bedroom. He grabbed her arms and put his face next to hers, then inserted his finger into her vagina "a little bit."[2] The victim was screaming the entire time. Appellant tried to leave through the back door, but it was locked, so he grabbed the victim's hands and forced her to unlock the back door. Once outside, appellant ran away.

That night, neighbor Rene Chimil had been working outside his apartment when he heard the sound of glass breaking from the victim's apartment, followed minutes later by the victim's screams.[3] A transcribed 911 call Chimil placed at 11:29 p.m. was played for the jury.[4] Chimil reported that a Hispanic man had broken into his elderly neighbor's apartment through the window. The Hispanic man was wearing a white shirt and ran away toward San Marino street. Chimil identified appellant in the courtroom as the Hispanic man he observed.[5] Chimil also observed the victim coming out of her apartment after appellant. She appeared scared and was naked,

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[2] The victim initially stated appellant used his right hand to digitally penetrate her vagina and his left hand to push her, but later indicated she was not sure which hand or arm he used.

[3] Evidence presented indicated appellant had entered the victim's home by breaking her bedroom window.

[4] Two minutes earlier at 11:27 p.m., a 911 call had been placed by another neighbor, "Steven," reporting that "something is going on at my neighbor's place" because she was screaming "No, no" and "a bunch of stuff in Vietnamese" that sounded "like she's in trouble." Before the screaming, Steven had heard "metal scraping and bottles" clanking outside her window. Although Steven did not testify at trial, his transcribed 911 call was played for the jury.

[5] Chimil also testified that earlier that night, shortly before the incident involving the victim, he found appellant in his kitchen. Appellant smelled strongly of alcohol, and said he was looking for a girl. Chimil asked appellant to leave, but appellant refused, until Chimil's brother-in-law, Freddy Lopez, escorted him out. Neither Chimil nor Lopez was familiar with appellant.

screaming and gesturing toward the male who had run away. The police arrived within five to 10 minutes.

Chimil lived with his brother-in-law, Freddy Lopez, who was awakened that night by the victim's screams. Lopez opened the back door and saw a man running away. He also saw the victim standing naked by her back door. Lopez could not understand what she was saying, but she appeared upset and was pointing to her vagina.

Two female police officers interviewed the victim with the aid of a telephonic Vietnamese interpreter. Officer Jessica Cardenas of the Los Angeles Police Department (LAPD) testified it was difficult to work with the interpreter because the officers did not speak Vietnamese and could not verify the accuracy of the interpretation. Also, the interpreter seemed reluctant to ask the victim any sexual questions. When asked if the man had touched her, the victim did not disclose that he had inserted his finger inside her vagina. On cross-examination, the victim explained the interpreter had not asked whether the man inserted his finger in her vagina, only whether he had "touched" or rubbed her. The victim told the officers the man had been wearing a white shirt, and a suspect was located during the interview.[6] The officers took the victim to a field show-up, where she identified appellant as the man who assaulted her. No sexual assault exam was administered that night.

The day after the incident, additional detectives, one of whom spoke Vietnamese, interviewed the victim. The victim disclosed to the Vietnamese-speaking detective that appellant had vaginally penetrated her vagina with his finger. She initially declined the sexual assault exam, and felt afraid and ashamed about the assault; however, when informed of the risk of infection, she agreed to take a sexual assault exam that evening.

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[6] LAPD officers located appellant hiding in the bushes near the victim's home. Appellant was lying on his back with his hands inside his unzipped pants, and told officers he was "just playing with [his] testicles."

Nurse practitioner Page Courtemanche administered the sexual assault exam, approximately 20 hours after the assault.[7] Between the assault and the exam, the victim had taken a bath and also wiped her vaginal area with toilet paper. Courtemanche explained that a victim's post-assault hygiene could remove forensic evidence of the assault or cause it to deteriorate. During the exam, the victim indicated appellant had vaginally penetrated her with his finger for approximately five minutes. The bruises and abrasions observed on the victim's vaginal area were consistent with the mechanism of injury she described – a forceful digital penetration of her vagina.

B. *Defense Case*

The defense presented no witnesses.

C. *DNA Evidence Stipulation*

The parties stipulated that no male DNA was found on swabs taken from the victim's vaginal area on May 2, the day after the assault. The parties further stipulated that swabs taken from appellant's palms and fingernail scrapings on May 3, two days after the assault, revealed the following results: "Left palm, three contributors, all male. Right palm, two contributors, including at least one male. Minor contributor cannot be determined. Major contributor is [appellant]. Right fingernails, [appellant's] [DNA] only. Left fingernails, major contributor is [appellant]. Minor contributor cannot be determined due to insufficient [DNA] to develop a [DNA] protocol."

D. *Closing Arguments*

During argument, defense counsel focused on parts of the victim's testimony which were unclear or inconsistent, namely, the exact manner of penetration, such as which hand appellant used to push her and penetrate her. Defense counsel argued what likely occurred was that appellant entered the victim's home while intoxicated, and maybe they "bumped into each

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[7] The sexual assault forensic medical report that Courtemanche referenced is not part of the record on appeal.

other" or "[h]e might have pushed her, but he gets out." Defense counsel sought to undermine the victim's credibility by pointing out she did not disclose the sexual assault during the initial interview, and highlighting the absence of DNA evidence. The prosecution attributed any inconsistencies in the victim's testimony to the inherent difficulties of testifying through an interpreter, and the victim's circuitous manner of speech. The prosecutor also argued the insufficient DNA evidence did not establish the assault did not occur.

E. *Verdict and Sentence*

The jury found appellant guilty of the lesser crime of assault with intent to commit sexual penetration by a foreign object (§ 220, subd. (a), count one), acquitted him of burglary (count two), and found him guilty of sexual penetration by a foreign object (count three).[8] The jury was instructed on and rejected the lesser included offense of sexual battery. He was sentenced to state prison for a term of nine years. Appellant timely appealed.

## DISCUSSION

### I. Denial of Motion to Continue Trial

A. *Relevant Trial Court Proceedings*

On Friday, March 2, 2018, the prosecutor informed defense counsel of DNA samples from appellant that had not yet been tested. Although both the victim and appellant had been swabbed for DNA, only the victim's DNA swab had been sent to the crime lab, while appellant's swab had been used as a reference sample without being tested – an oversight the prosecutor had recently learned about after receiving the crime lab report. The prosecutor had arranged for expedited testing of appellant's DNA over the weekend, and was hopeful the results would be available Monday morning. On Monday morning, despite not having the test results, the parties announced in "Department 100" they were ready for trial and were assigned to a trial court.

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[8] The jury also found true the allegation that, in the commission of count three, the victim was 65 years or older (§ 667.9, subd.(a).)

A jury was empaneled that day. Defense counsel received the test results at 4:16 p.m. on Monday afternoon.

The following morning, Tuesday, March 6, while jurors and witnesses waited outside the courtroom ready for trial, defense counsel moved to continue the trial based on the new DNA evidence. The court expressed surprise at the defense motion because the DNA evidence was "exculpatory" in nature, noting "the right fingernails of [appellant] only contained his [DNA] despite the claim by the complaining witness that he digitally penetrated her vagina with a finger from his right hand." Defense counsel acknowledged the evidence was "helpful," but claimed he was not "ready or capable at this time to explain to the jury the [DNA] evidence and why it's helpful." The court also questioned defense counsel's failure to request a continuance Monday morning, when the parties were before "Department 100" and announced ready for trial. Defense counsel acknowledged his error.

The prosecutor argued the DNA evidence "could have been tested by the defense and it wasn't." Defense counsel had received the same report that alerted the prosecutor to the untested DNA swabs on February 22. Moreover, appellant's DNA swabs revealed "[t]here wasn't enough discernible [DNA] to be able to develop a profile of anyone other than the defendant."

The court weighed the "interests of justice" and denied the motion, observing the case turned on the credibility of the victim and other witnesses. The court noted the significant amount of time spent selecting the jury, and expressed concern about the victim's age. The court reiterated the DNA evidence was favorable to the defense, and observed that further testing would likely be futile and would unnecessarily delay the case.

B. *Applicable Law*

A motion for a continuance requires a showing of good cause. (§ 1050, subd. (e).) With respect to a request for a continuance to obtain evidence, the moving party must "show both the materiality of the evidence necessitating the continuance and that such evidence could be obtained within a reasonable time." (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.) The trial court must consider the benefit anticipated by the moving party, the likelihood that such benefit will result, the burden of a continuance on the

court, and whether substantial justice will be accomplished or defeated by granting a continuance. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1125-1126.) In ruling on a motion for a midtrial continuance, the trial court must also consider the burden on witnesses and jurors. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1105.) In addition, a defendant seeking a midtrial continuance must show diligence in preparing for trial. (*Id.* at p. 1106.)

The trial court has broad discretion to grant or deny a continuance. (*People v. Smithey* (1999) 20 Cal.4th 936, 1011.) Denial of a defendant's motion for a continuance requires reversal only where an abuse of discretion and resulting prejudice are shown. (*People v. Samayoa* (1997) 15 Cal.4th 795, 840.)

C. *No Abuse of Discretion in Denying Continuance*

1. Good Cause

The trial court did not abuse its discretion by denying the request for a continuance, as appellant failed to show good cause. Appellant failed to demonstrate the material impact of additional DNA testing because the DNA evidence had little bearing on the determination of appellant's guilt. By the time the victim was swabbed, 20 hours had passed since the assault, during which the victim had wiped her vaginal area and bathed, potentially removing any evidence of appellant's DNA from her body. Indeed, none was found. Appellant was swabbed almost two days after the assault and, not surprisingly, the swabs from his palms and fingernails were inconclusive, revealing no identifiable DNA other than appellant's. The test results established (1) that only male DNA was present in appellant's left palm, (2) that the DNA of "minor contributors" in appellant's right palm and left fingernails was insufficient to identify anyone other than appellant, and (3) that only appellant's DNA was present in his right fingernails. The only conceivable benefit appellant could have derived from additional testing would have been to challenge the insufficiency of the DNA collected from appellant's right palm and left fingernails by establishing it was discernible enough to exclude the victim's DNA. But even such an unlikely finding would not have exonerated appellant because the absence of the victim's DNA from his palm and fingernails was logically attributable to the delay in

obtaining appellant's swabs. Thus, we agree with the trial court's assessment that the DNA evidence had little, if any, materiality to justify a continuance.

As the trial court noted, the lynchpin of the prosecution's case was the credibility of the victim and the witnesses who corroborated her account. The victim's testimony at trial was generally consistent with what she communicated to her neighbors, the police officers who questioned her, and the examining nurse about the assault. Specifically, the victim reported appellant penetrated her vagina with his finger – a traumatic incident she admitted caused her to feel shame and embarrassment. The victim's initial omission of any reference to "touching" by appellant appeared to be the result of inaccuracies in the interpretation. Thus, any "ambiguity" in the victim's account did not seriously impair her credibility before the jury. Additionally, the neighbors corroborated the victim's account of the assault. Chimil and Steven placed 911 calls within two minutes of each other, reporting their neighbor was screaming. Chimil and Lopez observed appellant running away from the victim's apartment, and saw the victim naked, distressed, gesturing toward appellant, and pointing to her vagina. The victim identified appellant in the courtroom as the man who assaulted her, and Chimil identified him as the man who ran out of the victim's apartment. Shortly before the assault, Chimil and Lopez had discovered appellant in their kitchen, intoxicated and looking for a girl. When police found appellant near the victim's apartment, he appeared to be masturbating. Finally, the examining nurse confirmed that the victim's injuries were consistent with a forceful digital penetration of the vagina. On this record, the trial court had ample basis to conclude that a continuance to conduct additional DNA testing on evidence that did not inculpate appellant was not required.

We find no abuse of discretion in the trial court's determination that the midtrial continuance would place an undue burden on the court, the parties, and the jurors. Based on his experience, the judge reasonably concluded that additional DNA testing would be time-consuming and unlikely to yield more exculpatory evidence. The trial court is entitled to ensure that the matter proceeds in a timely fashion. (*People v. Fudge, supra,* 7 Cal.4th at p. 1107.) The court noted that defense counsel did not request a

continuance before the start of trial, as soon as he learned about the new evidence, and defense counsel acknowledged his error. Ultimately, the court denied the continuance after weighing the importance of the proposed evidence and its likely benefit to the defense against the burden imposed on the jurors and witnesses, the potential cost to the prosecution, and the court's resources already expended. The court concluded the DNA results were not material to the outcome of the case and were largely favorable to the defense. Furthermore, it was reasonable to conclude that defense counsel had not acted with due diligence in preparing for trial. The prosecutor had shared with defense counsel the crime lab report that revealed the untested DNA swabs on February 22, almost two weeks before the defense motion. Under these circumstances, we find no improper bias in the trial court's decision to proceed with trial, and no abuse of discretion in its denial of the request for a continuance.

2. Prejudice

The denial of a motion to continue trial requires reversal if there is a showing of both an abuse of discretion and prejudice to the defendant. (*People v. Barnett, supra,* 17 Cal.4th at p. 1126.) Even assuming the court erred by denying the continuance, appellant has not shown resulting prejudice under either federal or state standards. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of a more favorable result absent the error]; *Chapman v. California* (1967) 386 U.S. 18, 24 [error must be harmless beyond a reasonable doubt].) Here, the DNA results were inconclusive not because of any evident error in the testing process justifying the need for retesting, but because "[t]here wasn't enough discernible [DNA] to be able to develop a profile of anyone other than the defendant." Additional testing would have done nothing to change the quality of DNA samples obtained from appellant after forensic evidence had likely deteriorated or been removed over two days of routine hygiene. The court's mischaracterization of the victim's testimony and reliance on her recanted statement that appellant used his right hand to penetrate her vagina was inconsequential. The test results of appellant's left fingernails revealed only that there was a "minor contributor" whose forensic profile could not be

determined due to insufficient DNA. It was unlikely the jury relied on this inconclusive finding to conclude that appellant sexually penetrated the victim with his left finger. The inconclusive DNA evidence essentially rendered it meaningless.

In contrast, there was strong, credible evidence against appellant by three eyewitnesses whose testimony established (1) that he was at the scene before the assault, (2) that he fled from the scene immediately after the assault, and (3) that he was the man who committed the sexual penetration. The victim's testimony was also corroborated by two 911 calls contemporaneous to the assault, and the findings of the sexual assault exam which revealed vaginal bruises and abrasion consistent with a forceful digital penetration. In light of the strength of the overall evidence inculpating appellant, any anticipated testimony by a DNA expert was speculative, and retesting of the DNA swabs would not likely have produced a more favorable outcome for appellant. Thus, appellant suffered no discernible prejudice.[9]

## II. Jury Instruction on Lesser Included Offense

### A. *Applicable Law*

Trial courts have a duty, even in the absence of a request, to instruct juries in criminal cases in those principles of law necessary to assist them in understanding the case. (*People v. Moye* (2009) 47 Cal.4th 537, 548; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Courts must instruct juries on lesser included offenses where there is substantial evidence from which a jury could conclude that the lesser offense was committed and the greater offense was not. (*People v. Cook* (2006) 39 Cal.4th 566, 596.) "Substantial evidence is

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[9] Appellant does not separately raise or provide legal support for his claim of ineffective assistance of counsel, apart from his broad assertion that appellant was prejudiced under federal constitutional standards. To establish ineffective assistance of counsel, appellant must also demonstrate prejudice – that is, a "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (*People v. Centeno* (2014) 60 Cal.4th 659, 676, citing *Strickland v. Washington* (1984) 466 U.S. 668, 694.) For the reasons explained above, appellant has not done so.

evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.)

"An uncharged offense is included in a greater charged offense if either (1) the greater offense, as defined by statute, cannot be committed without also committing the lesser (the elements test), or (2) the language of the accusatory pleading encompasses all the elements of the lesser offense (the accusatory pleading test). [Citations.]" (*People v. Parson* (2008) 44 Cal.4th 332, 349, italics omitted.)

The standard of review for failure to instruct on a lesser included offense is de novo. (*People v. Woods* (2015) 241 Cal.App.4th 461, 475.) Under that standard, we consider the evidence in the light most favorable to the defendant. The question is not whether the evidence supports conviction of the greater crime; it is "whether, in assessing and weighing the evidence independently, the jury could have reasonably concluded that [the defendant] committed" the lesser crime but not the greater. (*Ibid.*)

B. *No Substantial Evidence of Lesser Included Battery*

Appellant contends the trial court should have instructed the jury, sua sponte, that simple battery is a lesser included offense of sexual penetration by a foreign object. Appellant reasons that because the victim initially denied appellant sexually touched her, the jury could have concluded that appellant committed battery, but not sexual penetration. We disagree.

"A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242.) An act of sexual penetration is a crime "when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person . . . ." (§ 289, subd. (a)(1)(A).) "Sexual penetration" is defined as "the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object." (§ 289, subd. (k)(1).) A "[f]oreign object" includes "any part of the body." (§ 289, subd. (k)(2).)

Although there are no cases squarely on point, defendant relies on *People v. Hughes* (2002) 27 Cal.4th 287 (*Hughes*), in which our Supreme Court held that battery was a lesser included offense of forcible sodomy. (*Id.* at p. 366.) *Hughes* is arguably distinguishable because the statutory definition of sodomy is "sexual conduct consisting of contact between the penis of one person and the anus of another person . . . when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." (§ 286, subds. (a), (c)(2).) In contrast, sexual penetration by a foreign object encompasses the penetration "'of any person'" and has been held not to require any touching or application of force upon the person of another – a necessary element of battery. (See *People v. Keeney* (1994) 24 Cal.App.4th 886, 889 [affirming conviction of sexual penetration by a foreign object of defendant who did not penetrate the victim but forced her at gunpoint to penetrate herself with her fingers].)

Moreover, even assuming misdemeanor battery is a lesser included offense of sexual penetration by a foreign object, there was no substantial evidence that appellant committed the lesser but not the greater offense. No reasonable jury could have found that appellant committed only the battery, but not the sexual penetration. Such an improbable conclusion would have required the jury to accept the victim's testimony that appellant forced entry into her apartment while she was bathing naked and made forcible contact with her, while rejecting her testimony that the contact was sexual in nature. It would have required the jury to ignore the testimony of witnesses who observed appellant distraught and gesturing toward her vagina, who reported she described appellant's sexual assault, and who examined her vaginal injuries and determined they were consistent with a forcible digital penetration. The victim's initial failure to refer to a touching, communicated through the imperfect filter of a reluctant telephonic interpreter, did not pose a serious challenge to her credibility. The victim overcame any suggestion to the contrary when she successively reported the sexual assault to a Vietnamese-speaking police officer, an examining nurse, and the jurors at trial. Either the sexual penetration was committed, or no crime at all was committed.

Thus, even had we found error, we would deem it harmless. (See *Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Watson, supra,* 46 Cal.2d at p. 836.) ""[E]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions."" (*People v. Beames* (2007) 40 Cal.4th 907, 928.) The evidence supporting the jury's guilty verdict of sexual penetration by a foreign object was so strong that it is not reasonably probable the alleged error affected the result. Notably, the jury was instructed on and rejected the lesser included offense of sexual battery, further evidencing that the jury credited the victim's testimony in its entirety. On this record, we find no error by the trial court in failing to instruct on battery as a lesser included offense.

## DISPOSITION

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.